

**From:** Don Drinko  
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**Gallagher Sharp Shop Talk: Workers' Compensation**

**QUESTION: When considering an application for Permanent Total Disability (PTD) compensation, must a hearing officer consider the ability to develop new skills?**

OAC 4121-3-34 sets forth the Industrial Commission's rules and guidelines for the adjudication of PTD applications. If, after hearing, the Staff Hearing Officer finds the injured worker is unable to return to his former position but may be able to engage in other employment, the adjudicator must consider "non-medical" factors (age, education, work skills, etc.) and whether the claimant may be able to return to work using past skills or "those skills which may be reasonably developed through retraining or through rehabilitation." *OAC 4121-3-34(D)(2)(c)* The controlling case in this area is *State ex. rel. B.F. Goodrich Co. v Indus. Comm.*, 73 Ohio St. 3d 525 (1995), in which the Supreme Court held that the Commission's explanation of the non-medical factors was insufficient. Recently, the Tenth Appellate District considered a case involving the application of *B.F. Goodrich*, and whether the Industrial Commission erred in granting PTD without stating how non-medical factors could be improved in the future.

*State ex rel. Nationwide Children's Hosp. v. Indus. Comm.*, 2018-Ohio-1806, involved a claimant who suffered serious injuries to her neck and shoulder in 2010 while working as a secretary. The claimant subsequently developed major depressive disorder, which was also allowed in the claim. The claimant received TTD compensation for 4 years, until her conditions were found to have reached MMI. At that point, she applied for PTD, supported by a report from an orthopedist and two reports from a psychologist finding that she was not able to work. However, the psychologist issued a later report implying that with treatment, her symptoms could be improved. The employer opposed the motion, and provided medical and psychological reports indicating that while she could not return to her former job, she likely could engage in light duty work. (One psychiatrist concluded that she could "sustain a status set of tasks without fast pace or frequent changes" and that she can interact with others "briefly and superficially.") Following a hearing, an SHO issued an order granting PTD compensation. The employer moved for reconsideration, arguing (among other things) that the psychologist's opinion was "equivocal" because he felt that her depression could be "reduced to mild levels." The full Industrial Commission granted the motion and ordered a new hearing, after which it agreed that PTD should be granted. The employer filed a *mandamus* action in the Tenth District, citing *B.F. Goodrich* in arguing that the Commission had erred when it considered the claimant's employment history, age, and educational background but not whether there are skills that may be reasonably developed that can lead to future employment. A Magistrate for the Tenth District conducted an exhaustive review of facts and law, and concluded that the Industrial Commission's order should be vacated, prompting appeals from all parties. Counsel for the Industrial Commission and claimant filed objections to the Magistrate's decision.

The Tenth District, while acknowledging that the Magistrate's position was legally correct, rejected the findings and reinstated PTD. The Court noted that the claimant is 64 years old and all parties acknowledge that she has serious psychological problems. She is able to perform only

the most sedentary light work due to her allowed physical conditions, and her psychological condition makes it difficult to interact with people. They noted that the claimant did not complete high school, could no longer work as a secretary or retail associate, and that the job of key punch operator no longer exists. The Court went on to state that while it understood and agreed with the magistrate's application of *B.F. Goodrich*, it also agreed with the observation of counsel for the Commission and the claimant that the claimant's case was far different from the facts in *BF Goodrich*. Ultimately, it elected to sustain the objections, adopt the findings of fact, but reject the conclusions of law, and affirmed the award of PTD compensation.

*Nationwide* is clearly a case where the significant battles were won, but it was the claimant who won the war. The decision should likely be considered to be limited to its facts, and *B.F. Goodrich* remains good law. The magistrate's opinion that *BF Goodrich* required a determination with regard to future development of skills or improvement was a correct reading of the law, but the Court cited the claimant's age, lack of skills, and severe restrictions imposed by even the employer's doctors in finding that the claimant was PTD. Employers should be aware of *Nationwide*, but also prepared to distinguish it.

If you would like to submit a question to Shop Talk, or would like to discuss this or any other workers' compensation issues, please feel free to contact me.

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